BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HIPOLITO BANUELOS	)	
Claimant	)	
VS.	)	
	)	Docket No. 180,288
EXCEL CORPORATION	)	
Respondent	)	
Self-Insured	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

On July 11, 1995 the Application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Thomas F. Richardson on January 30, 1995 came on for oral argument in Topeka, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, Chris A. Clements of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Robert A. Anderson of Ellinwood, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations listed in the Award.

ISSUES

The sole issue to be considered on appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments and briefs of the parties, the Appeals Board finds claimant has sustained a 21.5 percent permanent partial general disability.

The parties stipulated at regular hearing that claimant met with personal injury by accident by way of a series during the period from March 1993 through June 4, 1994. For the purposes of calculating benefits and determining the applicable law, the Administrative Law Judge found claimant's date of accident to be June 4, 1994 based upon Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). During oral argument counsel for the parties agreed that this case had been litigated throughout as an "old law" work disability claim under K.S.A. 1992 Supp. 44-510e and stipulated that the 1993 amendments should not apply. The Appeals Board accepts the stipulation of the parties and will use an agreed accident date of June 30, 1993 for purposes of this review.

Claimant was employed by respondent on the kill floor when he developed pain in his left shoulder, both wrists and hands. Following three surgeries, Dr. J. Mark Melhorn released claimant to return to work with permanent restrictions. Claimant could not perform his regular duties and, accordingly, was given accommodated work with respondent. He was, thereafter, referred by his attorney for an independent medical examination by Dr. Ernest R. Schlachter, a general physician. He concluded that restrictions similar to those recommended by Dr. Melhorn should be imposed.

Because his is a nonscheduled injury the determination of permanent partial disability compensation is controlled by K.S.A. 1992 44-510e(a) which provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Both Dr. Melhorn and Dr. Schlachter opined that claimant did not possess the ability to return to his previous work on the kill floor and recommended less physically demanding duties. Although the physicians viewed a videotape showing a worker operating only one Japanese machine, and were asked to imagine a worker operating two simultaneously, as claimant was expected to do, both agreed that the accommodated job claimant selected with the respondent appeared to fit within their respective restrictions and that claimant should be physically capable of performing that job. Claimant contends that since he is unemployed and, therefore, not earning comparable wages that he is entitled to a work disability. Vocational experts testified to claimant's loss of his ability to perform work in the open labor market and ability to earn comparable wages. Respondent counters that claimant's award should be limited to his functional impairment due to the fact that he was offered accommodated employment within his restrictions but failed to qualify for that employment as a result of his intentional lack of effort, citing Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), as controlling.

Mr. Kerry Daly, line supervisor for the respondent, testified to the respondent's attempt to return claimant to accommodated employment. Claimant went through the touring process. Employees who have been hurt and return to lighter duty work are toured through the plant to pick jobs that they can do, then they are given two weeks to qualify on that job. Claimant picked running the Japanese machines. These machines split open the small intestines, trim the fat to a certain consistency, chop them to a certain length, wash and clean them. When a person qualifies, he is able to run both machines without letting the intestines clog up and run onto the floor, run both machines with the fat consistency equal, keep the intestines going on one after the other, make sure the chopper blades are working properly in order to chop the correct length and, basically, keep the machine running. Excel has eight Japanese machines and there are four operators for these machines. After a two-week training period claimant would then be expected to perform to the same level that the other employees were expected to perform.

The first day when claimant was brought around about 4:30 or 5:00 p.m., he requested Mr. Daly to sign his vacation slip. Mr. Daly could not sign the vacation slip until it was found claimant qualified for the job. Claimant was then taken out on the floor, briefed regarding the operation of the machines and was assigned to Lorraina Ramirez, a qualified operator. Claimant watched her for a while and then helped her run one machine while she kept the other one running and supervised him. They worked together for seven days before claimant was put in charge of running two machines. Ms. Ramirez had the ability to speak Spanish. Ms. Ramirez's responsibility, in this case, was to keep both machine running, as her regular job required, and show claimant what to do when the machines clogged up, sharpen blades and, generally, talk him through any problems he may have encountered.

The second day on the job, Mr. Daly noticed product was running off one side of the machine onto the floor and into a floor drain on the other side of the machine. Claimant was consistently talking to other machine operators and he would wait for someone to tell him there was a problem with his machine before he would turn to supervise his own machines and fix any problems.

After a week of watching, learning, practicing and running the machines, claimant met with the trainer to learn what the trainer felt claimant needed to work on to qualify for work on the Japanese machines. The trainer's position is to take new hires through orientation consisting of an exercise program, sharpening their knives, teaching them proper equipment use, tour the floor explaining their specific jobs and then put them to work. The trainer communicated constantly with claimant regarding things he needed to work on. On claimant's last day of work, he went into the office without changing his clothes and asked Mr. Daly to either fire him, disqualify him for the position or sign his vacation slip so he could go on vacation. Mr. Daly could not sign the vacation slip because claimant had not completed his two-week training period, which ended that day at midnight. Claimant angrily left the office and went out on the floor to work on the machines. Mr. Daly observed claimant, three to six times a period, standing by his machine with an intestine in one hand and another intestine running. Mr. Daly talked with claimant regarding his work and asked him to clean up the mess. Claimant was later removed from the floor and a Personnel Action Record was filled out stating employee was toured and picked the job of the Japanese machines. He was given two weeks to qualify on the job and did not qualify. Therefore, he was terminated. According to Mr. Daly claimant was being terminated because he could not keep two machines running, adjusted for fat content and

allowed product run onto the floor. Mr. Daly testified that claimant was capable of running the machines but, in his opinion, was not interested in doing so.

Claimant described his attempt at running the Japanese machines this way. On his first day he observed Lorraina running the machine and approximately a day and one-half later he started doing the job himself. Someone actually stood there with him when he was operating the machine for about a day and one-half. He thinks Lorraina probably would have lost her job if he had qualified because she was the one that had less seniority. He had problems in the performance of his job in that big pieces of fat would fall down because he could not lift the fat up. He does not remember Mr. Daly talking to him about having product on the floor, but the employees that were working the Japanese machine with him told him that if you drop some product on the floor the company lost product. There were occasions when he let product fall on the floor because he could not hold it due to pain in his wrist and shoulder. He reported his wrist and shoulder pain two or three times during that two-week period to Kim, the company nurse, who provided no treatment and sent him back to work. Claimant said he performed the job to the best of his ability. Claimant acknowledges that Mr. Daly was frequently in the area of his machines, but did not confront claimant regarding his job performance. Claimant stated that Mr. Daly never talked with him regarding improvement with his job performance. He acknowledged that they frequently talked, but not about his job performance. On claimant's last day worked he asked Mr. Daly to sign his vacation slip, thereby giving the company two to three weeks notice to make arrangements for another operator to take over the machine in his absence. Claimant feared that if his anniversary date with Excel passed before he took his allotted vacation time, he would lose it. He wanted to go to Mexico and was anxious to schedule his vacation before his July 2 anniversary date. July 2 was claimant's last day at work. He indicated he was never given notice, by supervisors or coworkers, that his job performance was not meeting their satisfaction. He had no reason to believe that he was going to be let go for low job performance. Claimant did not know his supervisors were dissatisfied with his job performance on the Japanese machine until Mr. Daly told him that he did not qualify and he would be terminated. Claimant did not tell anyone he could not perform the job on the Japanese machines and feels today that he could and would perform that job if they would take him back.

In Foulk, the claimant was offered a comparable wage job which was within her physical restrictions and claimant refused same. The Court of Appeals found that to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable when the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended that workers not receive compensation where they are capable of earning nearly the same wage. The Court of Appeals further stated that it would be unreasonable to conclude that the legislature intended to encourage workers to merely sit home, refuse to work and take advantage of the workers compensation system.

In the instant case, claimant was offered and agreed to return to an accommodated position with respondent at what appears to have been a comparable wage. However, claimant failed to make a good faith effort to learn and perform that job. The claimant's protestations to the contrary are not credible. His testimony was inconsistent and self-contradictory. At various times he said he was able to do the job and was, in fact, operating the Japanese machine as well as the other operators. However, at other times, claimant testified that the reason he could not keep up and the product was going on the floor was because of his injuries. Still, at other times, he related all his problems, with

regard to his operation of the Japanese machine, to a lack of training. The Appeals Board finds that because respondent made claimant a specific offer of an accommodated job within his restrictions, the rationale of the Foulk decision is applicable to the facts of this case. Thus, claimant is not entitled to a work disability in excess of his stipulated 21.5 percent functional impairment rating.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson entered January 30, 1995 should be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Hipolito Banuelos, and against the respondent, Excel Corporation, a qualified self-insured, and the Kansas Workers Compensation Fund, for an accidental injury which occurred June 30, 1993 and based upon an average weekly wage from June 30, 1993 to June 4, 1994 of $407.88, for 10.14 weeks of temporary total disability compensation at the rate of $271.93 per week or $2,757.37, followed by 38.29 weeks at the rate of $58.46 per week or $2,238.43. Thereafter, for the period commencing June 5, 1994 and based upon an average weekly wage of $451.31 claimant is entitled to 366.57 weeks at the rate of $64.69 per week or $23,713.41 for a 21.5% permanent partial general body impairment of function, making a total award of $28,709.21.

As of May 3, 1996, there is due and owing claimant 10.14 weeks of temporary total disability compensation at the rate of $271.93 per week or $2,757.37, followed by 38.29 weeks of permanent partial disability compensation at the rate of $58.46 per week in the sum of $2,238.43, followed by 99.86 weeks of permanent partial disability compensation at the rate of $64.69 per week in the sum of $6,459.94, for a total of $11,455.74, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $17,253.47 is to be paid for 266.71 weeks at the rate of $64.69 per week, until fully paid or further order of the Director.

An award is entered in favor of the respondent and against the Kansas Workers Compensation Fund for an amount equal to 50% of all sums heretofore paid to or on behalf of claimant pursuant to their stipulation, and the Fund is ordered to pay 50% of the remaining award directly to claimant.

Claimant is awarded $1,618.40 in medical mileage.

Claimant is awarded unauthorized medical expense of up to $350.00.

Claimant is entitled to future medical treatment upon proper application to and approval by the Director of Workers Compensation.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

Fees and expense of administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and insurance carrier 50% and the Kansas Workers Compensation Fund 50% to be paid directly as follows:

Kelly Pfannenstiel	
Regular Hearing by Deposition	Unknown
Underwood & Shane	
Deposition of Kerry Daly	$299.90
Cindy Fenton	
Deposition of Alfred Rodriguez	Unknown
Ireland Court Reporting	
Deposition of Dr. Melhorn	$167.44
Don K. Smith & Associates	
Deposition of Dr. Schlachter	$150.75
Deposition of Jerry Hardin	$337.40

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Robert A. Anderson, Ellinwood, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director